No. 1243.

# UNITED STATES

# CIRCUIT COURT OF APPEALS

## For the Ninth Circuit

---

HENRY WINTERS, ET AL,

Appellants.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

---



BRIEF FOR APPELLANTS.

---

B. PLATT CARPENTER,
E. C. DAY,
STEPHEN CARPENTER,
JAMES A. WALSH,
C. C. NEWMAN,
R. E. O'KEEFE,
Solicitors and of Counsel for Appellants.

No. 1243.

# UNITED STATES

# CIRCUIT COURT OF APPEALS

## For the Ninth Circuit

---

HENRY WINTERS, ET AL,

Appellants.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

---

## BRIEF FOR APPELLANTS.

---

### STATEMENT OF FACTS.

This is an appeal from an interlocutory order enjoining the defendants and each of them from interfering in any manner with the use of 5,000 inches of waters of Milk River in the State of Montana by the Government of the United States upon the Fort Belknap Indian Reservation in said State (Tr. p. 87). The interlocutory order was entered after a hearing in response to an order to show cause (Tr. p. 21) made upon the filing of a Bill of Complaint (Tr. p. 5) which, after the formal allegation as to the parties, alleged among other things as follows:

"Fourth.

"That heretofore, to-wit, on or about the 1st day of May, A. D. 1888, a large tract of land situate within the northern part of the then Territory, now State of Montana, and then and there and thereafter, and at all times hereinafter mentioned, the property of your orator the said United States, was reserved and set apart by the said United States as an Indian Reservation as and for the permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation, that the said Indian Reservation is now situate in the county of Chouteau, in the State and District of Montana, and its boundaries were at the said time of the creation of said reservation fixed and defined as follows, to-wit:

Beginning at a point in the middle of the main channel of Milk River, opposite the mouth of Snake Creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk River opposite the mouth of Peoples Creek; thence up Milk River, in the middle of the main channel thereof, to the place of beginning.

That ever since the said 1st day of May, A. D. 1888, the said aforementioned and described tract of land has been, and the same is now an Indian Reservation, and the property of your orator subject to the occupancy of the said bands or tribes of Indians, and the same ever since the 1st day of May, A. D. 1888, has been and is now occupied and

inhabited by the said bands or tribes of Indians as and for their permanent home and abiding place.

Fifth.

That the said Fort Belknap Indian Reservation extends to the middle of the main channel of said Milk River, which said river is a non-navigable stream and water course, the said line in the middle of the main channel of said Milk River being the northern boundary line of said reservation. That large portions of the lands embraced within said reservation are well fitted and adapted for pasturage and the grazing and feeding thereon of stock and horses and cattle. That other large portions of said reservation are adapted for, and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of crops of grass, grain, and vegetables. That ever since the establishment of said Indian Reservation large herds of cattle, the property of your orator and of the Indians residing upon said reservation, and large numbers of horses, the property of said Indians, have been and are now feeding, pasturing and grazing upon said reservation and upon the lands within said reservation being and situate along and bordering upon said Milk River.

Sixth.

That such portions of the said Fort Belknap Indian Reservation as are adapted and fitted for farming and cultivation and the pursuits of agriculture thereon, as aforesaid, are of a dry and arid character, and in order to make the same productive, and for the purpose of successfully raising thereon crops of grain, grass and vegetables, require large quantities of water for the purpose of irrigating the same. That without water for the irrigation of said lands, the same would be and remain unproductive, and it

would be impossible to successfully raise upon said lands crops of grain, grass, and vegetables. That heretofore, in the year 1889, your orator erected and constructed houses and buildings upon said reservation for the occupancy and residence of the United States Indian agent and the officers of your orator having the charge and superintendency of said reservation and the Indians residing thereon, generally known as the Fort Belknap Agency, and ever since the said year 1889, the said buildings and premises have been occupied by the United States Indian Agent and the officers and agents of your orator having charge and superintendency of said reservation. That the said agency depends entirely for its water supply for domsetic, culinary and irrigation purposes upon the waters of the said Milk River, and that at all times, ever since the erection of said houses and buildings and the establishment of said agency, your orator has been obliged and is now obliged to depend for its water supply for said agency and for the purposes aforesaid upon the waters of said Milk River. That heretofore, and long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to-wit, in the year 1889, your orator through its officers and agents at said Fort Belknap Agency, for the purpose of obtaining the requisite amount of water for domestic, culinary and irrigating purposes for said agency appropriated, took and diverted from the channel of said Milk River, by means of pumps, pipes and waterways a large amount, to-wit, a flow of one thousand miners inches of the waters of said Milk River, and by means of pumping the same out of the channel of said Milk River, and by ditches, pipes and waterways conducted the said waters of said river, so taken and diverted from said river as aforesaid, from the channel of said river to the said agency

buildings and premises, and after so conducting the said waters to said agency buildings and premises, used the same for domestic, household and culinary purposes, and also for the irrigation of lands adjacent to, connected with and surrounding said agency buildings and premises, and by means of the use of said waters for irrigation purposes raised upon said premises adjacent to and connected with said agency crops of grain, grass and vegetables. That thereafter, but long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to-wit, on the 5th day of July, A. D. 1898, your orator and the Indians residing upon said reservation, for the purpose of bringing and conducting water to and upon the lands of said Fort Belknap Indian Reservation with which to irrigate the same and raise thereon crops of grain, grass and vegetables, appropriated, took and diverted from the channel of said Milk River, by means of canals, ditches and waterways, additional large amounts of the waters of said Milk River, to-wit, a flow of ten thousand miners inches of the waters of said river, and by means of canals, ditches and waterways conducted the water of said river, so taken and diverted from the said river as aforesaid, from the channel of said river to and upon divers and extensive tracts of land upon said reservation aggregating in amount about thirty thousand acres of land, and after so conducting said water to and upon said lands used the same for irrigation of said lands, and for domestic and other useful purposes, and by means thereof raised upon said lands crops of grain, grass and vegetables.

That ever since the said year 1889, and down to the time of the commission of the wrongs and grievances committed by the said defendant as hereinafter set out and complained of, your orator and its officers and agents residing

at said agency, have constantly and uninterruptedly used and enjoyed the said waters of said Milk River so taken and diverted as aforesaid in the year 1889, at and upon said agency for domestic, culinary and household purposes, and for the irrigation of the lands and premises adjacent to and connected with said agency, and for raising upon said premises crops of grain, grass and vegetables, and ever since the said year 1898, and down to the time of the commission of the wrongs and grievances by the said defendants hereinafter set out and complained of, your orator and its officers and agents and the said Indians residing upon the said reservation as aforesaid, have continuously and uninterruptedly used and enjoyed the said waters of said Milk River so appropriated, taken and diverted as aforesaid, on the 5th day of July, 1898, upon said lands embraced within said reservation for irrigating, domestic and other useful purposes, and by means of said waters so taken and diverted from said Milk River, and used by your orator and the said Indians residing thereon as aforesaid, have raised upon said lands crops of grain, grass and vegetables and carried on agricultural pursuits, and your orator has been enabled by means thereof to train, encourage and accustom large numbers of the Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement.

Seventh.

And your orator further showeth unto your Honors that large tracts of lands within said Fort Belknap Indian Reservation, being and situate along and contiguous to the channel of said Milk River, are used by your orator from year to year for the pasturing, feeding, raising, and grazing of livestock, principally horses and cattle, the property of your orator and said Indians residing upon said

reservation. That in order to enable your orator and said Indians to successfully and properly pasture and feed said horses and cattle upon said lands, it is necessary and essential that the waters of said Milk River should be permitted to flow down the channel of said river, to supply and furnish said stock with drinking water. That unless the waters of said river are permitted to flow down the channel of said river, the said cattle and horses, so pasturing and feeding upon said lands, will be deprived of water necessary for drinking purposes, and will render valueless for grazing, feeding and ranging purposes large tracts of lands within said reservation, situate along and contiguous to the channel of said Milk River.

Eighth.

And your orator further showeth unto your Honors that all of the waters heretofore so taken, appropriated and diverted from the channel of said Milk River as aforesaid, are essential and necessary for the use of your orator at the agency on said Fort Belknap Indian Reservation for household, domestic and culinary purposes, and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken and diverted. That in order to enable your orator to maintain said agency, and in order to promote the civilization and improvement of the said bands and tribes of Indians upon said reservation and the encouragement of habits of industry and thrift among them, and in order to make all of the said lands within the said reservation which are adapted and suitable for farming and ranching and the pursuits of agriculture susceptible of cultivation and productive

for the raising thereon of crops of grain, grass and vegetables, large quantities of water flowing in said Milk River will be required and necessary for the purpose of irrigation of the said lands within said reservation and the reclamation of said lands. That for the purpose of subserving and accomplishing the ends and purposes for which said reservation was created, and in order to subserve the best interest of your orator and of the Indians residing upon said reservation, and the best interest of your orator in furthering and advancing the civilization and improvement of said Indians, and to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on the pursuits of agriculture and stock-raising as aforesaid, it is essential and necessary that all of the waters of said Milk River should be permitted to flow down the channel of said river, uninterruptedly and undiminished in quantity, and undeteriorated in quality.

Ninth.

And your orator further showeth unto your Honors, that notwithstanding the riparian and other rights of your orator and of the said Indians to the uninterrupted flow of all of the waters of said Milk River, as aforesaid, down the natural channel of said river, the said defendants, heretofore, to-wit, in the year 1900, wrongfully and unlawfully, and without the license, consent or approval and against the wishes of your orator and of the said Indians, and without the license, consent or approval and against the wishes of the Secretary of the Interior of the said United States, and in utter disregard of the rights of your orator and the Indians residing upon the said Fort Belknap Reservation, entered upon the said Milk River and its tributaries above the points of diversion of the said waters of said river by

your orator and said Indians, as aforesaid, and above the places of use of said waters by your orator and said Indians, and built, erected, and constructed in and across the channel of said Milk River and its tributaries large and substantial dams and reservoirs and by means of said dams and reservoirs impeded, obstructed and prevented the waters of said Milk River and its tributaries from flowing down the natural channel of said river to the places of your orator's points of diversion and use of the said waters of the said river. That by means of said dams and reservoirs and by means of canals, ditches and water-ways made and constructed wrongfully and unlawfully and without the license, consent, or approval of the Secretary of the Interior, over and through the public lands of your orator, by the said defendants, said defendants appropriated, took, and diverted all of the waters of the said Milk River and its tributaries out of and away from the channel of said river and its tributaries and by means of said canals, ditches, and water-ways, conducted and conveyed the same long distances away from the channel of said Milk River and its tributaries and away from the said Fort Belknap Indian Reservation. That by means of said dams and reservoirs and said canals, ditches and water-ways said defendants prevent any of the waters of said Milk River and its tributaries from flowing down the channel of said river to your orator's points of diversion and places of use of said waters, and wholly deprived your orator and the Indians residing upon said reservation of the use of the waters of said river, all of which said acting and doings as aforesaid, of the said defendants was without the license, consent or approval of your orator, the said United States, and without the license, consent or approval of the Secretary of the Interior of the said United States."

In response to the order to show cause entered as aforesaid, the defendants made several appearances. The defendant Empire Cattle Company filed and read the affidavits of its President (Tr.p. 31) and Cal. C. Shuler (Tr. p. 35) setting forth that since June 23rd, 1897, it has been a corporation organized and existing under the laws of the State of Montana, with power to acquire and own real and personal property. That it is the owner of certain described lands in Township 33 North of Range 19 East Principal Meridian of Montana, which lands are arid in character and require the use of water for irrigating purposes in order to successfully raise thereon crops of grain, grass and vegetables. "That the title to a large portion of the said lands has been obtained from the United States Government under the laws thereof relating to desert lands, and that the west fork of Milk River flows through the said lands and all of them." That on the 13th day of January, 1899, the defendant, with others, appropriated four thousand inches of the waters flowing in the west fork of Milk River, by posting the statutory notice at the point of diversion, filing a copy thereof for record, and constructing a dam and ditch described in the affidavit, diverting the said waters by means thereof, conducting them upon the described lands, and irrigating said lands during each and every year since 1899, up to and including 1905, to the extent of eight hundred acres. That thereby the defendant became entitled to use sufficient of the said waters of the west fork of Milk River to irrigate eight hundred acres of its said lands.

The defendants Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser filed and read the affidavits of Andrew H. Reser and Ezra T. Reser, (Tr. p. 38) showing that on February 12th, 1900, the defendants Bertha Reser

and Lydia Reser, who were each of them then and there qualified citizens of the United States, offered to enter under the Desert land laws of the United States three hundred and twenty acres of land lying in sections 11, 12 and 13, Township 34 north, range 18 East, Principal Meridian of Montana; that on January 26th, 1900, they appropriated fifty cu. ft. per second of the waters of the west fork of Milk River, by posting and recording the statutory notice and by the construction of a described dam and ditch by means of which the said waters were diverted and conducted to and upon the described lands and used in irrigating the same and raising thereon crops of grain, grass and vegetables; that upon the 23rd day of September, 1903, Bertha Reser and Lydia Reser surrendered their filings upon said lands and transferred their water rights to Andrew H. Reser, Ezra T. Reser and Clarence B. Reser, who were then and there qualified citizens of the United States, and who immediately applied to enter the said lands under the Desert Land Laws of the United States. That the defendants Bertha Reser and Lydia Reser have now no interest in said lands and are not using or diverting the said waters. That the waters so appropriated were by these defendants Andrew H. Reser and Ezra T. Reser, together with their associate Clarence B. Reser, taken out and conducted by ditches theretofore constructed to and upon the said lands, and have been used for the purpose of irrigating crops of grain, grass and vegetables during the season of 1905, and the said appropriators have cultivated about two hundred and forty acres of the said land during said season. That about four hundred acres of the said lands so filed upon by the said appropriators are susceptible to cultivation by irrigation, and without the use of the said water the said lands and the whole

thereof would be and remain unproductive, and it would be impossible to successfully raise upon the said lands crops of grain, grass or vegetables. That these defendants and their predecessors in interest have spent large sums of money, to-wit, about the sum of..... dollars in improving said lands and in constructing dams and ditches for the diversion of the said waters and conducting the same upon the said land. That it is the intention of these defendants in good faith to so continue to cultivate the said lands as to enable them to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands. But that if the said defendants are restricted by order of this Court from using the said waters of the West Fork of Milk River it will be impossible for them to comply with the said laws, and their rights to the said lands as herein above set forth will be forfeited."

The defendant Agnes Dowen presented and read in her behalf her own affidavit to the effect that she was a desert land claimant to a tract of three hundred and twenty acres of unsurveyed public lands in Chouteau County, Montana, and that in the year 1902, she had appropriated for use upon the said lands in reclaiming the same from their arid condition, twelve cu. ft. per second of the waters of the North Fork of Milk River; that it is her intention and good faith to use the said waters upon said lands to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands, and that if she is restrained by order of this court from using the said waters, her rights to the said land will be forfeited.

The defendants the Matheson Ditch Company, Thomas Dowen, John W. Acher presented and read the affidavits of John Matheson (Tr. p. 48), Thomas Dowen (Tr. p. 52)

John Prosser (Tr. p. 55), John W. Acher (Tr. p. 57), D. E. Martin (Tr. p. 60) and J. S. Roberts (Tr. p. 61) and the response of the Matheson Ditch Company (Tr. p. 47), from which it was made to appear that the Matheson Ditch Company was a corporation organized and existing under the laws of the State of Montana for the purpose of constructing, maintaining and repairing a ditch taken out of the North Fork of Milk River, known as the Matheson North Fork Ditch; but that the Matheson Ditch Company did not own or claim to own any of the waters flowing in the said ditch or in the said stream, but that the Company owned and operated the ditch for the benefit of its share holders owning water rights and entitling them to the use of the waters of said North Fork in the proportion that their respective shares bear to each other, and to the whole amount of shares of said Company outstanding. That the said John Matheson was the owner of about six hundred acres of land lying under the said ditch and had used through the said ditch the waters of the North Fork of Milk River under an appropriation made on the 9th day of May, 1890, by one M. T. Ridout, together with one J. W. Clark, by posting and filing for record the required statutory notices and the construction of a described ditch. That Thomas Dowen and John Buckley used through the said Matheson Ditch at least two hundred inches of the waters of the said North Fork of Milk River by virtue of an appriation made by Alex Buckingham on May 12th, 1895. That John Prosser and Celia A. Gelder were entitled to the use of one hundred inches of the waters of said North Fork of Milk River through the said Matheson Ditch by virtue of an appropriation made by James Davis in the year 1895; that the said defendant John W. Acher was entitled to the use of at least two hundred inches of the

waters of said North Fork of Milk River through the said Matheson Ditch by virtue of an appropriation made by one Fred Davis in the year 1893, and that one H. M. Burrus was entitled to the use of one hundred inches of the waters of the said North Fork of Milk River through said Matheson Ditch by virtue of an appropriation made in the year 1895 by said James Davis, and that the shares of stock in said Matheson ditch were divided as follows:

John Matheson, 56 shares; H. M. Burrus, 15 shares; Thomas Dowen, 20 shares; John R. Prosser, 10 shares; Henry Bosch, 10 shares; John Acher, 5 shares.

The defendant Henry Corregan presented and read the affidavit of himself (Tr. p. 63), showing that he was in the possession of unsurveyed public lands in township 36 North of Range 18 East Principal Meridian of Montana, claiming the right to occupy the same under and by virtue of a Desert Land Entry; that for the purpose of reclaiming the said lands he, with one Sarah Corregan did on the 12th day of October, appropriate 20 cubic feet per second of the waters of the North Fork of Milk River by posting and recording the required notice of appropriation and constructing a described ditch by means of which he diverted the said waters and conducted them upon his said lands to at least the extent of one hundred inches; that it is his intention in good faith to use the said waters upon said lands and to obtain title thereto from the United States under the laws thereof relating to Desert lands, and that if he is restrained by order of this Court from using the said waters his right to the said lands will be forfeited.

The defendant Henry Winter read and filed his own affidavit (Tr. p. 66) showing that he was entitled to the use of 400 inches of the waters of Milk River for the irrigation of certain lands described in the said affidavit under

and by virtue of an appropriation made on the 18th day of March, 1896, by Perry E. Wyncoop and Julia H. Wyncoop, which said appropriation was made by posting and filing for record the required notice of location and the construction of a ditch described in the said affidavit by means of which waters were diverted and conducted to and upon lands therein described and used for the purpose of irrigation.

The defendants the Cook's Irrigation Company and Chris. Kruse presented, first an objection to the issuance of the said injunction, and a motion to dissolve the temporary restraining order (Tr. p. 28, 29), upon the following grounds:

"First. That the bill of complaint is verified only on information and belief, and no affidavit in support of the allegations has been filed or submitted.

Second. That it does not appear that the complainant is entitled to maintain an action for and in behalf of the Indians located upon the reservation mentioned in the complaint.

Third. It does not appear that the defendants are joint tortfeasors.

Fourth. It does not appear that the defendants did not appropriate and divert waters according to the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the country.

Fifth. It does not appear in the bill of complaint that the defendants are not riparian proprietors upon the said Milk River and its tributaries.

Sixth. And for other reasons appearing in the bill of complaint herein."

The said defendants also read and filed the affidavits of James N. Cook and John D. Blackstone (Tr. p. 70) from

which it appeared that the Cook's Irrigation Company was a corporation organized under the laws of the State of Montana, and its stockholders were citizens and residents of the United States, and of the State of Montana, and they and their predecessors in interest were qualified to make entries of public lands under the land laws of the United States; that there were about twenty stockholders of the said corporation, each of which were the owners of lands or in the possession thereof under and by virtue of the land laws of the United States; that there were about twenty stockholders of the said corporation, each of which were the owners of lands or in the possession thereof under and by virtue of the land laws of the United States, all of which lands were situated on the Milk River or its tributaries within the valley and water sheds of said stream, and which were arid riparian agricultural lands and would not produce crops unless irrigated.

That the said stockholders, and each of them, or their predecessors in interest, during the years 1895 and 1896, and most of them during the year 1895, for the purpose of irrigating and rendering productive the lands held by them respectively, and for household and other domestic uses, and under and by virtue of the laws of the United States, the laws of the State of Montana, and the decisions of its courts, and the rules and customs of the country, appropriated and diverted from the North Fork of said Milk River an amount of water sufficient to irrigate their said lands respectively, owned and occupied by them, and conveyed the same through the ditch, hereinafter mentioned, and through laterals radiating therefrom, to, over and upon their said lands respectively, and used the same for irrigating said lands and producing hay, grain and other crops thereon, and for household and other domestic

purposes, and in all things complied with the laws of the United States, the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country relating to diverting and appropriating water for beneficial purposes.

That the said North Fork of Milk River is a non-navigable stream, and at the time the said waters were so diverted, appropriated and conveyed, the lands along the banks of said stream, above the point of said diversion, were unappropriated public lands.

That the said stockholders are not parties to this suit other than as they are interested as stockholders of the defendant Cook's Irrigation Company.

That the said stockholders, or their predecessors in interest, relyng upon the land laws of the United States, and the rights granted to appropriators of water, for the purpose of reclaiming desert lands, made entries, under the land laws of the United States, of the lands held by them respectively, and diverted and appropriated the waters of said North Fork of said Milk River, as aforesaid.

That the said lands, owned and occupied by the said defendants and its stockholders, are so situated that the said waters can be more economically conveyed to the same through one ditch, and then distributed to the several tracts by laterals connecting therewith, and for the more economical use of the said water, and the construction of a ditch for conveying the same to said lands, the said stockholders organized the corporation of Cook's Irrigation Company, for the purpose of constructing and maintaining an irrigation ditch to reclaim and irrigate the lands of the said stockholders so occupied by them; the rights of the said stockholders being determined by the amount of water appropriated by them, and the amount

of stock of said corporation owned by them respectively.

That the said defendant, Cook's Irrigation Company, and its stockholders, who are citizens of the Unitted States, as aforesaid, acting under the laws of the United States and the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country, and for the purpose of conveying water to, over and upon their said lands, for the purpose of reclaiming the same, constructed an irrigation ditch, tapping the waters of said North Fork of Milk River, and expended thereon in labor and money the sum of over twenty thousand dollars ($20,000.00) and which ditch is eighteen feet wide, two and one-half feet deep, and ten miles long, with an average fall of twelve inches per mile, and with numerous laterals leading therefrom to the different tracts of land, owned by the said stockholders.

That the construction of said ditch was commenced on or about the first day of October, 1895, and work thereon was prosecuted with reasonable diligence until the same was completed, and the same was used for conveying water to irrigate said lands, commencing with the year 1896, and has been used continuously since that time, and for the purposes aforesaid, by this defendant and its said stockholders.

That this defendant and its said stockholders have heretofore irrigated from said ditch in the aggregate about three thousand (3,000) acres of land, and that the said ditch and its laterals will cover and irrigate over five thousand (5,000) acres of land, and the said stockholders are extending their works of irrigation and reclaiming the lands covered by said ditch and its laterals.

That the amount of water of said stream, appropriated by the said defendant and its stockholders, as aforesaid,

and conveyed through said ditch and its laterals, and used for the purpose of irrigating said lands and other purposes, as aforesaid, exceed fifty (50) cubic feet per second, and two thousand (2,000) miner's inches, and the said use of said waters is a reasonable use thereof.

That by reason of the said appropriations and diversion of said waters, a large area of lands have been reclaimed and made productive, and lands theretofore unoccupied and unproductive were settled upon and improved, and homes established thereon, and large amounts were expended for building residences, barns and other outbuildings, and building fences, constructing roads, bridges and other improvements, exceeding in all more than one hundred thousand dollars ($100,000.00).

That if the said defendant, Cook's Irrigation Company, is enjoined from conveying said water, through its said ditch, for the use of said stockholders, the said defendant, and its stockholders, will be greatly and irreparably damaged, and the said lands will be greatly depreciated in value, and a large portion thereof must be abandoned as homes, and the said defendant's ditch will be rendered worthless; and unless the temporary restraining order herein is dissolved, or so modified that the said defendant may convey said water for the use of its stockholders, within a period of five days, large areas of their hay and grain will be ruined, to their great and irreparable damage.

That by reason of said ditch, so constructed by the defendant, Cook's Irrigation Company, and ditches constructed by other persons, conveying water from said Milk River and its tributaries, the waters of said stream at flood time, have been distributed over the lands, and gradually seeped back into the stream, and the flow of said stream was thereby made more uniform and continued in a larger

volume during the dry season that it was prior to the time the said irrigation works were constructed and the waters of said stream so used; that before the said irrigation works were constructed and the said waters so used, the said Milk River was accustomed to going dry during the late summer and fall.

That since the injunction was issued herein, the flow of water in said stream has been far in excess of the needs of the complainant herein, and a large amount of water is flowing past the said reservation.

That prior to the time the said ditch was constructed and the said waters appropriated, diverted and used, as aforesaid, there was no appropriation of water made upon the said Indian Reservation, for agricultural or other purposes, excepting a small pumping plant, which was used for pumping water for use for domestic purposes, and to irrigate not to exceed eight acres of land; that said pumping plant, since the said ditch was constructed and the appropriation made as aforesaid, has been greatly enlarged, and the said plant now consists of an engine, having a cylinder nine and one-half inches inside diameter, with twelve inch stroke, at ninety pounds pressure, running at one hundred and fifty revolutions per minute, and raising water sixteen feet, and part of it fifty feet, to a tank to be used for culinary purposes. That said pumping plant is not being run continuously, and the said lands so irrigated do not require to exceed one acre foot per acre of water during the entire year, and that not more than three hundred people are supplied at the said Indian Agency with water for domestic and culinary purposes.

That there are springs and other streams upon the said reservation sufficient to supply stock pastured thereon, and that the stock pastured upon said reservation seldom go

to the said Milk River to drink.

That the said appropriation, mentioned in the complaint, claimed to have been made by the complainant, in the year 1898, is through a ditch about eighteen feet wide, two and one-half feet deep, with a fall of about nine inches to the mile, and, according to deponent's best information and belief, the said ditch has not any branches or laterals, excepting one, and only a small amount of land is irrigated thereby, and only a small amount of water is applied to any beneficial use or purpose.

That the said Milk River, above the said reservation, is fed by numerous tributaries, and that long since the canal was constructed by the Cook's Irrigation Company, and the said water appropriated, diverted and used, as hereinbefore set forth, divers and sundry persons and corporations have, on the said tributaries and on the main stream of said Milk River, constructed dams and ditches, and diverted, appropriated and conveyed, and still continue to divert, appropriate and convey large quantities of said waters of said tributaries and said Milk River, in excess of firteen thousand (15,000) inches, and thereby prevent the same from flowing down said stream, which said persons and corporations are not parties to this suit, and that a large portion of the waters flowing through the said North Fork of said Milk River, which of right belong to the said Cook's Irrigation Company, and its stockholders, and which are now permitted to flow down the said stream, on account of the injunction herein, are taken up and used by some of the said subsequent appropriators, and do not reach the said reservation."

After the reading of these affidavits the plaintiff introduced as a witness W. R. Logan the Indian Agent, who testified substantially (Tr. p. 80) that the waters from Milk

River are used upon the said Reservation for household, culinary, domestic and irrigation purposes; that there are two pumping plants in operation, one supplying the agency proper with water for household, domestic and irrigation purposes, constructed in 1889, with a capacity of 100 inches, the other supplying the schools and other buildings constructed in 1893, with a capacity of 150 inches. That in 1898, the Government commenced to construct a canal tapping the waters of Milk River for the purpose of conducting the water upon the Reservation for irrigation purposes, and this canal was now about eleven miles long and had been in operation since the year 1898, and that at this time they were irrigating approximately five thousand acres of land. That there are upon the Reservation approximately about thirty thousand acres of land which are susceptible of irrigation through the said canal; that the present necessities of the said Indians require at least five thousand inches of the waters of said stream.

Upon granting the injunction order appealed from the court filed a memorandum of its opinion (Tr. p. 83, et seq.) to the effect that when the Indians made the treaty granting to the United States lands not embraced within the Reservation, they reserved the right to the use of the waters of Milk River, at least to an extent reasonably necessary to irrigate the lands retained in the Reservation, which right so reserved continues to exist against the United States, and its grantees, as well as against the State of Montana and its grantees. And that patents, if any, that have been issued by the Land Department for lands held by the defendant, are subject to the treaty and the defendants can acquire no rights to the exclusion of the reasonable needs of the Indians, which needs, as appear to the Court, were five thousand inches.

The laws of Montana with reference to the appropriation of water in force during the period of time covered by this controversy are as follows: (Compiled Statutes of Montana, Fifth Division, p. 995.)

"Sec. 1250. The right to the use of running water flowing in the rivers, streams, canyons, and ravines of this territory, may be acquired by appropriation.

Sec. 1251. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

Sec. 1252. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

Sec. 1253. The water appropriated may be turned into the channel of another stream and mingled with its waters, and then be reclaimed; but, in reclaiming it, water already appropriated by another must not be diminished in quantity, or deteriorated in quality.

Sec. 1254. As between appropriators the one first in time is first in right.

Sec. 1255. Any person hereafter desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

First. The number of inches claimed, measured as hereinafter provided.

Second. The purpose for which it is claimed and place

of intended use.

Third. The means of diversion, with size of flume, ditch, pipe, aqueduct, in which he intends to divert it.

Fourth. The date of appropriation.

Fifth. The name of the appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county recorder of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion on such stream with reference to some natural object or permanent monument. The recorded notice shall be verified by the affidavit of the appropriator, or some one in his behalf, which affidavit must state that the matters and things contained in the notice are true.

Sec. 1256. Within forty days after posting such notice the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

Sec. 1257. A failure to comply with the provision of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions

of this act, the right to the use of the water shall relate back to the date of posting the notice."

These sections were originally a part of the Act of the Legislature of the Territory of Montana, March 12, 1885, and have since been carried in to the codification of the laws of the State of Montana in force July 1, 1895, as sections 1880 to 1888, both inclusive, of the Civil Code of the State of Montana.

## ASSIGNMENT OF ERRORS.

The appellants assign as error upon this appeal the following, to-wit:

The Circuit court erred in making the interlocutory order granting an injunction in this case for the following reasons:

1. The said Circuit Court erred in holding that by the treaty made and entered into the first day of May, 1888, between the United States and the Indians residing upon the Fort Belknap Indian Reservation, there was reserved to the said Indians the right to the use of the waters of Milk River to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty, and that by the said treaty there was reserved to the said Indians the right to the use of said waters at all.

2. The said Circuit Court erred in holding that the reservation of the waters of Milk River, if any, contained in the treaty of May 1, 1888, entered into by the United States, to the Indians residing upon the Fort Belknap Reservation, was binding upon respondents or any of them so as to affect the rights of the respondents to the use of the waters of the tributaries of said Milk River based upon acts of appropriation done and had in pursuance to the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the

country.

3. The said Circuit Court erred in holding that the rights of the Indian living upon said reservation to the use of the waters of Milk River were superior to the rights of the respondents or either of them, for the reason that the proof showed affirmatively and without contradiction that the respondents and each of them had diverted, appropriated and applied to a useful purpose the waters of the said river or its tributaries, according to the laws of the United States, the laws of the State of Montana and decisions of its courts, and customs of the country to the extent claimed by them, and there was no proof showing that there had ever been an appropriation of the said waters or any thereof according to the said laws, decisions and customs by the said Indians, or on their behalf.

4. The said Circuit Court erred in holding that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these respondents or either of them to the prior right to the use of 5,000 inches of the waters of Milk River, or to the prior right to the use of the said waters at all.

ARGUMENT.

The questions presented by these several assignments of error may be briefly stated thus:

1. Whether the United States has any, and if any, what rights as a riparian owner to the waters of Milk River as against appropriators under state laws.

2. Whether the rights of an appropriator of water under the laws of the State of Montana are not superior to those of a person, corporation or government, not appropriating in compliance with those laws.

3. Whether there was any reservation in the treaty with the Indians of the waters of Milk River for the use

of the Indians on the Belknap Reservation.

---

Has the United States any rights in the waters of Milk River as a riparian owner, and if so what?

It cannot be said that the United States in its governmental capacity, as between it and its citizens is the riparian owner of the waters in a stream. As between it and a foreign nation it may be a riparian owner as to the waters in the streams forming the boundaries of its territory. As to its citizens, prior to the time of settlement and grant of its lands, it is the absolute owner of both land and water.

Story vs. Woolverton (Mont.) 78 Pac., 589.

Questions of title to either land or water therefore is determinable by grant. If the United States has not granted away the use of the waters of Milk River, it is still the owner thereof and can control the flow without reference to the needs of the Indians or of these appellants. The rights are determinable solely with reference to the grants of the land and water, and the common law doctrine of riparian ownership, as it was applied between private owners of land has nothing to do with the question at issue, which arises between the United States and its citizens and grantees. Nor can it be said that the United States as guardian of the Indians is entitled to exercise the rights of a riparian owner. The Indians are not the owners of the lands included within the Reservation. They are merely occupants of lands owned by the United States, set apart and reserved for their use. Their occupancy of the lands does not add to or take away from the title of the United States.

As early as 1823, Chief Justice Marshall, in the case of Johnson vs. McIntosh, 8 Wheaton, 543, said: "It has never

been doubted that either the United States, or the several states had a clear title to all the lands within the boundary described in the treaty (with Great Britain) subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it. * * * * The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet any attempt of others to intrude into that country would be considered as an aggression which would justify war. The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise."

From that decision down to the present day there has been no modification of the rule that the Indian tribes within the United States are domestic, dependent nations, or rather wards of the Government. They have merely the right of occupancy of the lands and the United States may dispose of the fee thereof as it sees fit.

United States vs. Kagama, 118 U. S. 379.

Raff vs. Burney, 168 U. S. 221.

Butz vs. Northern Pacific Railroad Co., 119 U. S. 66.

Spalding vs. Chandler, 160 U. S. 403.

Beacher vs. Witherbee, 95 U. S. 517.

United States vs. Cook, 19 Wallace, 591.

In Caldwell vs. Robinson, 59 Fed. 653, on page 654, Beatty, Judge, said:

"From the Mississippi River to the South Sea, the country was claimed by an absolute title by the Governments of France and Spain. Their title passed to the United States by treaties with France in 1803, and with Spain in 1819. The only right ever conceded to the Indians was that of occupancy, which has generally proven to be the merest shadow of a right when it became inconvenient to the dominant race."

In United States vs. Alaska Packers' Ass'n, 79 Fed., 152, on page 156, Judge Hanford said:

"The treaties made with the several Indian tribes are not to be regarded as conveyances of the title to lands in Washington Territory, from the Indians, as proprietors, with limitations and reservations of easements. The Government of the United States does not deraign title to its public lands from the Indians. The National Government is the primary source of title, and, as original proprietor, it had the power to dispose of public lands, even within an Indian Reservation, without the consent of the Indians."

In determinng the right to the waters of Milk River of appellants, all of whom are grantees from the United States, the local laws, rules and customs must govern in the interpretation of the grants. Grants of the government for lands bounded on streams and other waters without any reservation or restriction of terms are to be construed as to their effect according to the law of the state in which the lands lie.

Hardin vs. Jordan, 140 U. S. 371.

In this case Mr. Justice Bradley cites with approval the opinion in the case of Middleton vs. Pritchard, 4 Ill., 510,

in which it was said "The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law and rules adopted by each local government, where the land may lie." Concluding, Mr. Justice Bradley says: "In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie."

Whitaker vs. McBride, 197 U. S. 510.

Grand Rapids & I. Ry Co. vs. Butler, 159 U. S. 87.

As to the rights attaching to lands within the territorial limits of the state, whatever has become a settled rule of real property by the decisions of its courts is conclusive on this court.

Lowndes vs. Town of Huntington, 153 U. S. 1.

In St. Anthony Falls, W. P. Co. vs. Board of Water Comrs. 168 U. S. 349, Mr. Justice Peckham, after laying down the rule that the rights of riparian owners are to be determined by state laws and decisions, says "This principle we think has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original states and those which were subsequently admitted to the union under the provisions of the Federal constitution."

Under the laws of the State of Montana, the decisions of its courts, and the customs of the country the right to the use of the waters flowing in the rivers of this territory and state may be acquired by appropriation. The affidavits filed in behalf of the several defendants show that each of

them has complied with these laws and made a valid appropriation of the waters of Milk River and its tributaries claimed by them respectively and they are complying with the several requirements of the state law to maintain such appropriation. The notices of appropriation posted and filed by the respective defendants are not incorporated in the records, for the reason that, under the Statutes heretofore quoted, as construed by the Supreme Court of the State of Montana, a valid appropriation may be made by diverting the water and applying it to a beneficial use.

Murray vs. Tingley, 20 Mont., 260.

DeNecochea vs. Curtis, 22 Pac., 199.

Wells vs. Mantes, 34 Pac., 325.

It is not claimed that the United States or any one in its behalf has complied with those laws. In fact the claim is made in the Bill of Complaint that the United States has a superior right to the waters of this stream by virtue of its riparian ownership. But it is the settled rule of law of these western states that the right to water which comes from a valid appropriation of it to a beneficial use is superior to the rights of a riparian owner.

Atchison vs. Peterson, 20 Wall. 510.

Basey vs. Gallagher, Id. 670.

Clark vs. Nash, 168 U. S. 361.

Clough vs. Wing (Ariz.) 17 Pac. 453.

Austin vs. Chandler (Ariz.) 42 Id., 483.

Reno S. M. & R. W. vs. Stevenson (Nev.) 20 Nev. 274, 21 Pac. 317.

Stowell vs. Johnson, 7 Utah 215; 26 Pac. 290.

Moyer vs. Preston, 6 Wyo. 308; 44 Pac., 845.

Drake vs. Earhart, 2 Ida. 722; 23 Pac. 543.

Krall vs. United States, 79 Fed. 243; 48 U. S. App. 711; 24 C. C. A. 543.

Speake vs. Hamilton (Ore.) 21 Or. 7; 26 Pac., 856.
Isaacs vs. Barer, 10 Wash., 130; 38 Pac. 873.
Union Mill & Min. Co. vs. Ferris, 2 Sawy. 176; Fed. Cases No. 14,371.
Union Mill & M. Co. vs. Dangberg, 81 Fed. 73.

These laws, decisions of the courts and customs of the country have been recognized by the laws of the United States. The right to appropriate water on public lands was recognized by Congress in 1866.

Comp. Stat. Sec. 2339, 2340.

It is again expressly recognized by the Act of Mar. 3, 1887, as amended by the Act of March 3, 1891.

Comp. Stat. p. 1348, 1349.
Broder vs. Natoma M. & M. Co. 101 U. S. 274.
U. S. vs Rio Grande D & I. Co. 174 U. S. 690.
Gutierres vs. Albuquerque, etc. Co., 188 U. S. 545.
Smith vs. Denniff, 24 Mont., 20.

The only limitations upon the exercise of this power by the state are two, as set forth in the opinion of Mr. Justice Brewer in U. S. vs. Rio Grande D. & I. Co. supra. First, the reservation on the part of the United States of the waters necessary for the beneficial uses of government property. Second, the reservation on the part of the United States of the control of the navigable streams within the limits of the United States. Neither of these limitations affect the case at bar, except to the extent perhaps of entitling the agency to the use of waters for domestic purposes at the agency buildings. The irrigation of the Indians' lands is not a governmental function.

The very laws under which most of the defendants have acquired their titles to the lands owned by them recognize the doctrine of appropriation under the state laws. The Act of March 3, 1877, as amended in 1891, (19 Stat. 377,

26 Stat. 1096) provides that the right to the use of water by the person so conducting the same upon the desert lands shall depend upon bona fide prior appropriation, and all surplus water over and above such actual appropriation and use, together with the water of *all lakes, rivers and other sources of water* supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights. And by the Act of 1877, this Act was made specially applicable to the then territory and now State of Montana.

II.

The court in granting the order appealed from filed a memorandum of its opinion (Tr. p. 83) to the effect that when the Indians made the treaty granting to the U. S. lands not embraced within the Reservation, they reserved the right to use the waters of Milk River, at least to an extent reasonably necessary to irrigate the lands retained in the Reservation. If any such reservation is contained in the treaty it is there by implication. No express reservation is there contained. The material parts of the treaty, waiving the formal parts, are as follows:

"Whereas the reservation set apart by act of Congress approved April fifteenth, eighteen hundred and seventy-four, for the use and occupancy of the Gros Ventres, Pie gan, Blood, Blackfoot, River Crow, and such other Indians as the President might, from time to time, see fit to locate thereon, is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their present or prospective wants; and whereas the said Indians are desirous of disposing of so much thereof as they do not require, in order to obtain the means to enable them to become self-supporting, as a pastoral and agricultural

people, and to educate their children in the paths of civilization: Therefore, to carry out such purpose, it is hereby agreed as follows:

"Article I.

"Hereafter the permanent homes of the various tribes or bands of said Indians shall be upon the separate reservations hereinafter described and set apart. Said Indians acknowledging the rights of the various tribes or bands, at each of the existing agencies within their present reservation, to determine for themselves, with the United States, the boundaries of their separate reservation, hereby agree to accept and abide by such agreements and conditions as to the location and boundaries of such separate reservation as may be made and agreed upon by the United States and the tribes or bands for which such separate reservation may be made, and as the said separate boundaries may be hereinafter set forth.

"Article II.

"The said Indians hereby cede and relinquish to the United States all their right, title, and interest in and to all the lands embraced within the aforesaid Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservation, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes, and they do hereby severally relinquish to the other tribes or bands respectively occupying the other separate reservations, all their right, title and interest in and to the same, reserving to themselves only the reservation herein set apart for their separate use and occupation.

"Article V.

"In order to encourage habits of industry, and reward

labor, it is further understood and agreed, that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided for in Article III, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or engage in pastoral pursuits, as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time, as shall best promote the objects specified."

By the Act ratifying the treaty it is provided:

"Sec. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain."

It will be noticed that by Article II of the treaty the Indians expressly cede and relinquish all their right, title and interest in and to all the lands embraced within the limits of their former reservation, not included within the limits of the present reservation. Also, that the Act of Congress ratifying the treaty, expressly provides that the lands to which the right of the Indians is extinguished under the foregoing agreement, are a part of the public domain of the United States, and are open to the operation of the laws relating to homestead entries, and the laws governing the disposition of coal mines, desert lands and mineral lands. These provisions are in conflict with and pro-

hibit any implied reservation of the use of the waters. When the Indians ceded all of the lands to which they had formerly claimed title, except those contained in the reservation, they relinquished all claim to the waters flowing in the streams through them, unless they expressly reserved such waters. When the Congress declared the lands to which the Indian title had been extinguished to be a part of the public domain, the water of *all the lakes, rivers and other sources*, unless expressly reserved, became subject to appropriation under the terms of Act of Congress March 3, 1877, as amended in 1891. All of the appropriations set forth in the affidavits of the defendants were made upon streams outside of the limits of the Indian Reservation, and were made upon streams which were included as a part of the public domain thus thrown open to settlement, and were made to be used upon lands thus thrown open to settlement, the title to which could not be acquired from the United States, except upon condition of appropriation of these waters.

There is no reservation contained in the grant given by the Government to appropriate water on a public domain. No authority is given to any department or officer to suspend the operation of that grant, or to withdraw it as to any land or locality. The Government did not reserve any right as riparian proprietor or otherwise which it can assert against any person who appropriates water upon the public domain, or water that flows through or past lands owned by the Government. The Government having the absolute title and right to dispose of all its lands including the lands within the Fort Belknap Indian Reservation, had authority to grant the right of appropriating water upon those lands and upon the reservation. No reservation or restriction having been made, the Govern-

ment cannot now, after these defendants have accepted the grant, acquired vested rights and expended a large amount of money in improving their lands, enjoin them from using the waters which they have appropriated. If it was intended to prohibit the settlers upon the riparian lands of Milk River and its tributaries from diverting and appropriating water to reclaim the desert lands and to provide that the waters of Milk River should be permitted to flow undiminished in quantity past the Indian Reservation, it was useless to restrict the Indians to the reservation as now defined, because the balance of the land would be worthless without water. The Act of Congress throwing open to settlement the land purchased from the Indians became a nullity, for the reason that the lands were not capable of being settled under the laws applicable to them without the use of the water.

It was contended in the court below that the waters of Milk River, so far as the same are a part and portion of the Fort Belknap Indian Reservation and needed upon said reservation for domestic and agricultural purposes, never were and never became public waters subject to appropriation by any person under state or federal laws. This proposition may be true so far as it is applicable to the case of an appropriator who is required to go upon the reservation for the purpose of appropriating waters there flowing. But it can have no application to the lands and waters claimed by these defendants for the reason that the treaty expressly ceded and relinquished to the United States all of the right, title and interest of the Indians in and to these identical lands, and the Act accepting and ratifying the treaty threw these lands open to settlement as a part of the public domain, and all the laws applicable to the public domain became immediately applic-

able to the territory thus thrown open to settlement.

It was also contended in the court below that this treaty should be construed most favorably to the Indians, and that it should be construed, not according to the technical meaning of its words, but in the sense in which the words would be naturally understood by the Indians. This principle might be true when applied to certain class of controversies. The controversy here is not between the Government of the United States and trespassers upon the Indian Reservation. In controversies of that characer it is customary and proper to construe these treaties and conventions most strongly in favor of the Indians. Here the controversy is between the United States, either in its governmental capacity or as guardian of the Indians, and the defendants who are citizens and grantees of the United States, and the controversy has reference to the titles granted by the United States to them. In such case the defendants are the public in whose behalf the grants must be construed most strongly. The property granted to them by their entry upon and settlement of the public lands of the United States, and the appropriation of the waters flowing in the streams adjacent thereto pursuant to the laws, decisions of the courts, rules and customs of the country, is property of which they cannot be deprived without due process of law, and without just compensation. These lands, after the Indian title had been extinguished, were thrown open to settlement and occupation, and the right of the state to provide for the appropriation of waters from the streams flowing over them was granted by Congress without any reservation of the flow of the waters in Milk River for the use of the Indian Reservation, or for any other governmental purpose. The defendants entered upon these lands in reliance upon these grants,

settled thereon, and have expended large sums of money in the perfection of their title to the lands and water. To take these rights away from them, and to destroy them as is attempted to be done in this case, is the taking of private property without any compensation. This the court will not do, nor will it construe a statute or treaty to have the effect of doing this act without such being the express terms of the statute or treaty.

The court below based his conclusion upon the intention of the parties to the treaty as derived from a construction of all of its terms. He says: "This construction of the treaty seems to me to be in accord with the rules which the Supreme Court has repeatedly laid down in arriving at the true sense of treaties with Indians," citing United States vs. Winans, 198 U. S. 371.

With all due deference to the opinion of the court it seems to us that a careful consideration of the decision in the case of the United States vs. Winans with reference to its facts will disclose that that decision recognizes the proposition for which we are here contending. In that case there was being considered a treaty in which the Yakima Indians ceded, relinquished and conveyed to the United States all of their right, title and interest in and to the lands and country occupied and claimed by them, reserving from the lands ceded for their own use the tract of land therein described. Article III of the treaty provided in its second paragraph as follows: "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of

hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

Construing this, Mr. Justice McKenna says: "At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands, and to define rights outside of them.

"The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words 'the right of taking fish at all usual and accustomed places *in common* with the citizens of the territory," confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the state, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership."

After reviewing the findings based upon the evidence to the effect that the defendants as owners of land had excluded the Indians from their fishing places, the court reviewing the decision of the court below says: "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. * * * The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they

breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted. * * * There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory' * * *" "The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they *possessed* as 'Taking fish at all usual and accustomed places.' "

It will be noticed that the court is here dealing with the construction of a treaty containing a reservation framed in clear and definite terms, whereas, in the treaty in controversy there are no terms applicable to the rights of appropriation at all The construction of the treaty in the Yakima case is made to turn upon the proposition that the Indians possessed and enjoyed these larger fishing privileges long prior to the making of the treaty, and that they were reserving those privileges to themselves. In the case at bar, at the time of the making of the treaty the Indians were not engaged in agriculture, and no water had ever been appropriated or diverted from Milk River for the purpose of irrigation upon the reservation, or for any other purpose whatsoever. The right to irrigate their lands was not a right possessed by the Belknap Indians at the time of the making of the treaty, nor was it a right which the Indians had ever claimed or exercised. In fact it can-

not be seriously contended that the Indians at the present time are desirous of irrigating their lands or converting them to the purposes of agriculture. The irrigation and cultivation of the Indian lands is a policy of the Indian Department, and not a practice of the Indian races. In the Yakima case the court was dealing with the reservation of the ancient rights and privileges of the Indians. In the Belknap case you are dealing with the policy of the Department which is directly opposed to the entire history, tradition and tendency of the Indian races. In the Yakima case the court was construing express words. In the case at bar the contention of the government calls for the reading into the treaty of an intention which never existed in the minds of the Indian tribes occupying the reservation.

In the Yakima case the court construed the terms "rights of fishery" to mean the rights as enjoyed and exercised by the Indians from time immemorial. In the Belknap case you are asked to construe "Agricultural pursuits", to mean the practice of agriculture, not as pursued by the Indians, but as developed by the scientists of modern times. Such a construction may be for the best interest of the Indian, but it takes a flight of the imagination to conceive of this idea being in the minds of the Indian signatories to this treaty. In the Yakima case the court construed express words so as to preserve for the Indians a right which they had always possessed, and which they could continue to exercise without any great injury to the lands thrown open to settlement by them. In the Belknap case you are asked to read into the treaty an intention to confer upon the Indians a right which they had never exercised, did not then claim, and would not now

exercise but for governmental compulsion, and which when exercised would destroy the value of every acre of land ceded by them to the United States, and lay waste thousands and thousands of acres made fertile by the labor and expenditure of settlers who had gone upon them under express authority from the government. Mr. Justice McKenna says "How the treaty in question was understood may be gathered from the circumstances." This is a rule well settled in its application to the construction of all written instruments. But it does not overturn express words. It is only when ambiguous words are used that it is invoked. Here there are no ambiguous words upon which the circumstances can throw light. The cession is of all of the right, title and interest of the Indians in the lands thrown open to settlement. Can it be said that the circumstances of the case requires a court of justice to imply a limitation upon that grant which would destroy its most valuable element?

III.

But the question involved in this controversy is not an open one in this court. It is the same question as was presented in the case of Krall vs. United States, 79 Fed., 241, 24 C. C. A. 543, in which it was held that the right of appropriation applies to the waters of non-navigable streams flowing through the public lands and the previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation. This decision has never been reversed or modified and stands as the law of this circuit applicable to this controversy.

We therefore respectfully submit that the order appealed from should be reversed and the cause remanded.

B. PLATT CARPENTER,
E. C. DAY,
STEPHEN CARPENTER,
JAMES A. WALSH,
C. C. NEWMAN,
R. E. O'KEEFE,
Solicitors and of Counsel for Appellants.